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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

10
11 ELAINE KOSOGON, Case No. CV 17-5746 SS
12 Plaintiff,
13 v.
14 NANCY A. BERRYHILL, Acting **MEMORANDUM DECISION AND ORDER**
15 Commissioner of Social
16 Security,
17 Defendant.
18

19 **I.**

20 **INTRODUCTION**

21 Plaintiff Elaine Kosogon ("Plaintiff") brings this action
22 seeking to reverse or, in the alternative, to remand the decision
23 of the Commissioner of the Social Security Administration (the
24 "Commissioner" or the "Agency") denying her application for social
25 security benefits. The parties consented, pursuant to 28 U.S.C. §
26 636(c), to the jurisdiction of the undersigned United States
27 Magistrate Judge. (Dkt. Nos. 12-14). For the reasons stated
28

1 below, the decision of the Agency is REVERSED and REMANDED for
2 further administrative proceedings.

3

4 **II.**

5 **PROCEDURAL HISTORY**

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7 On July 17, 2014, Plaintiff filed an application for
8 disability benefits claiming that she became disabled on July 7,
9 2014. ("Certified Administrative Record ('AR')," Dkt. No. 16 at
10 154-57). The Agency denied her application on December 15, 2014.
11 (AR 94, 97-102). Plaintiff then requested a hearing, which was
12 held before Administrative Law Judge ("ALJ") Richard Breen on
13 December 17, 2015. (AR 32-82). Plaintiff appeared with counsel
14 and testified. (AR 39-73). Elizabeth Brown-Ramos, a vocational
15 expert, also testified at the hearing. (AR 73-82).

16

17 On April 8, 2016, the ALJ issued a decision denying benefits.
18 (AR 16-31). Plaintiff sought review before the Appeals Council,
19 which denied her request on June 5, 2017. (AR 1-6). Plaintiff
20 filed the instant action on August 8, 2017. ("Complaint," Dkt.
21 No. 1).

22

23 **III.**

24 **THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

25

26 To qualify for disability benefits, a claimant must
27 demonstrate a medically determinable physical or mental impairment

28

1 that prevents her from engaging in substantial gainful activity¹
2 and that is expected to result in death or to last for a continuous
3 period of at least twelve months. Reddick v. Chater, 157 F.3d 715,
4 721 (9th Cir. 1998) (citing 42 U.S.C. § 423(d)(1)(A)). The
5 impairment must render the claimant incapable of performing the
6 work she previously performed and any other substantial gainful
7 employment that exists in the national economy. Tackett v. Apfel,
8 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C.
9 § 423(d)(2)(A)).

10
11 To decide if a claimant is entitled to benefits, an ALJ
12 conducts a five-step inquiry. 20 C.F.R. § 416.920. The steps are:
13

14 (1) Is the claimant presently engaged in substantial
15 gainful activity? If so, the claimant is found not
16 disabled. If not, proceed to step-two.

17 (2) Is the claimant's impairment severe? If not, the
18 claimant is found not disabled. If so, proceed to
19 step-three.

20 (3) Does the claimant's impairment meet or equal the
21 requirements of any impairments listed in 20 C.F.R.
22 Part 404, Subpart P, Appendix 1? If so, the
23 claimant is found disabled. If not, proceed to
24 step-four.

25 \\

26
27 ¹ Substantial gainful activity means work that involves doing
28 significant and productive physical or mental duties and is done
for pay or profit. 20 C.F.R. § 416.910.

1 (4) Is the claimant capable of performing his past
2 work? If so, the claimant is found not disabled.
3 If not, proceed to step-five.

4 (5) Is the claimant able to do any other work? If not,
5 the claimant is found disabled. If so, the claimant
6 is found not disabled.

7
8 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari,
9 262 F.3d 949, 953-54 (9th Cir. 2001) (citation omitted); 20 C.F.R.
10 § 416.920(b)-(g)(1).

11
12 The claimant has the burden of proof at steps-one through -
13 four and the Commissioner has the burden of proof at step-five.
14 Bustamante, 262 F.3d at 953-54. If, at step-four, the claimant
15 meets her burden of establishing an inability to perform the past
16 work, the Commissioner must show that the claimant can perform some
17 other work that exists in "significant numbers" in the national
18 economy, taking into account the claimant's residual functional
19 capacity ("RFC"),² age, education, and work experience. Tackett,
20 180 F.3d at 1100; 20 C.F.R. § 416.920(g)(1). The Commissioner may
21 do so by the testimony of a vocational expert or by reference to
22 the Medical-Vocational Guidelines appearing in 20 C.F.R. Part 404,
23 Subpart P, Appendix 2 (commonly known as "the Grids"). Osenbrock
24 v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001). When a claimant
25 has both exertional (strength-related) and nonexertional

27

28 ² Residual functional capacity is "the most [one] can still do
despite [her] limitations" and represents an assessment "based on
all the relevant evidence." 20 C.F.R. § 416.945(a).

1 limitations, the Grids are inapplicable and the ALJ must take the
2 testimony of a vocational expert. Moore v. Apfel, 216 F.3d 864,
3 869 (9th Cir. 2000).

4

5 **IV.**

6 **THE ALJ'S DECISION**

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8 The ALJ employed the five-step sequential evaluation process.
9 At step-one, the ALJ found that Plaintiff has not engaged in
10 substantial gainful activity since her alleged onset date. (AR
11 21). At step-two, the ALJ found that Plaintiff's obesity and
12 osteoarthritis of the left knee are severe impairments,³ but found
13 that Plaintiff's major depressive disorder is "nonsevere" because
14 it does not cause more than minimal limitation of her ability to
15 perform basic mental work activities. (AR 21-22). At step-three,
16 the ALJ found that Plaintiff's impairments, either singly or in
17 combination, do not meet or equal the requirements of any
18 impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1.
19 (AR 25). At step-four, the ALJ determined that despite Plaintiff's
20 severe disabilities, she retains a RFC compatible with her previous
21 relevant work. (AR 26-27). The ALJ concluded that Plaintiff can
22 perform light work as defined in 20 C.F.R. § 404.1567(b) with the
23 following additional limitations:

24

25 ³ The ALJ also found that Plaintiff's myopia, hypertension, and
26 diabetes mellitus are not severe impairments because the evidence
27 does not demonstrate that these are more than slight abnormalities
28 that cause more than minimal limitation in claimant's ability to
perform basic work activities. (AR 22). Plaintiff does not
challenge these findings.

[T]his individual can occasionally lift and carry 20 pounds, frequently lift and/or carry 10 pounds; can sit, stand, or walk for up to 6 hours in a workday; and push and pull as much as she can lift or carry.

(AR 25). Accordingly, the ALJ found that Plaintiff was not disabled. (AR 27).

v.

STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), a district court may review the Commissioner's decision to deny benefits. "[The] court may set aside the Commissioner's denial of benefits when the ALJ's findings are based on legal error or are not supported by substantial evidence in the record as a whole." Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (citing Tackett, 180 F.3d at 1097); see also Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996) (citing Fair v. Bowen, 885 F.2d 597, 601 (9th Cir. 1989)).

"Substantial evidence is more than a scintilla, but less than a preponderance." Reddick, 157 F.3d at 720 (citing Jamerson v. Chater, 112 F.3d 1064, 1066 (9th Cir. 1997)). It is "relevant evidence which a reasonable person might accept as adequate to support a conclusion." (Id.). To determine whether substantial evidence supports a finding, the court must "'consider the record as a whole, weighing both evidence that supports and evidence that detracts from the [Commissioner's] conclusion.'" Aukland, 257 F.3d

1 at 1035 (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir.
2 1993)). If the evidence can reasonably support either affirming
3 or reversing that conclusion, the court may not substitute its
4 judgment for that of the Commissioner. Reddick, 157 F.3d at 720-
5 21 (citing Flaten v. Sec'y of Health & Human Servs., 44 F.3d 1453,
6 1457 (9th Cir. 1995)).

7 **VI.**

8 **DISCUSSION**

9
10 **A. Plaintiff's Claims**

11
12 Plaintiff asserts two claims. First, Plaintiff disputes the
13 ALJ's step-two finding that her mental impairments are nonsevere.
14 ("Plaintiff's Memo," Dkt. No. 17 at 5-10). Plaintiff further
15 contends that the ALJ improperly considered the opinions of her
16 two treating physicians, Karina Shulman, M.D., and Sofia Vaisman,
17 M.D., during the step-two analysis. (Id.).

18
19 Second, Plaintiff disputes the ALJ's rejection of her pain
20 and symptom testimony. (AR 10-16). However, because the Court
21 finds the ALJ erred by finding Plaintiff's mental impairments
22 nonsevere, it is unnecessary for the Court to address Plaintiff's
23 second claim.

24
25 **B. The Step-Two Evaluation**

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27 By its own terms, the evaluation at step-two is a de minimis
28 test intended to weed out the most minor of impairments. See Bowen

1 v. Yuckert, 482 U.S. 137, 153-154 (1987); Edlund v. Massanari, 253
2 F.3d 1152, 1158 (9th Cir. 2005) (stating that the step-two inquiry
3 is a de minimis screening device to dispose of groundless claims)
4 (quoting Smolen, 80 F.3d at 1290); Webb v. Barnhart, 433 F.3d 683,
5 687 (9th Cir. 2005) (step-two is a "de minimis threshold"). An
6 impairment is not severe only if the evidence establishes a slight
7 abnormality that has only a minimal effect on an individual's
8 ability to work. Smolen, 80 F.3d at 1290 (internal quotations and
9 citations omitted) (emphasis added).

10
11 At step-two of the evaluation, the ALJ is bound by 20 C.F.R.
12 §404.1520a. That regulation requires the ALJ to follow a special
13 psychiatric review technique. The ALJ must determine whether the
14 claimant has a medically determinable mental impairment, rate the
15 degree of functional limitation for four functional areas,
16 determine the severity of the mental impairment and then, if
17 severe, proceed to step-three of the five-step evaluation. Keyser
18 v. Commissioner Social Sec. Admin., 648 F.3d 721 (9th Cir. 2011).

19
20 **C. The ALJ Applied More Than A De Minimis Standard At Step-Two**

21
22 The ALJ erred in concluding that Plaintiff's mental
23 impairments do not satisfy the step-two de minimis test. Given
24 the medical evidence, including both the treating and consultative
25 doctors' opinions concerning Plaintiff's mental impairments,
26 Plaintiff's mental impairment satisfied a de minimis standard at
27 step-two.

1 **1. The Treating Physicians' Opinions Are Consistent With The**
2 **Medical Record And Support A Finding Of Severe Mental**
3 **Impairments**

4
5 Plaintiff's mental impairments are sufficient to satisfy the
6 step-two de minimis test for severity. Plaintiff's mental health
7 treatment appeared to begin in 2014. (AR 154, 265-73, 314). The
8 record indicates that Plaintiff was diagnosed with major depressive
9 disorder and anxiety. (Id.). The ALJ, however, found the opinions
10 of both Plaintiff's treating physicians to be inconsistent with
11 the medical record and subsequently determined Plaintiff's mental
12 impairments nonsevere. (AR 22-23). The ALJ erred by giving little
13 weight to either treating physician's opinion, as their opinions
14 have substantial support in the record.

15
16 After two months of care, treating physician Dr. Sofia Vaisman
17 diagnosed Plaintiff with "anxiety [and] depression" and described
18 her as "disabled" on July 7, 2014. (AR 265-73). Over the following
19 fourteen months, Dr. Vaisman consistently affirmed Plaintiff's
20 anxiety and depression diagnosis. (AR 268, 377, 383, 388, 372, 393,
21 368, 402). Dr. Vaisman also noted the disorders' negative effects
22 on Plaintiff's memory, concentration, and ability to sleep. (Id.).
23 On six separate occasions, Dr. Vaisman recommended that Plaintiff
24 continue receiving medication and therapy, and receive "totally
25 disabled" status. (Id.) While under Dr. Viasman's care, Plaintiff
26 was regularly prescribed multiple antidepressants, including
27 Abilify, Trazodone, Cymbalta, Lexapro and Xanax. (AR 356, 368,
28 372, 377, 379, 383).

1 Dr. Karina Shulman began treating Plaintiff on October 8,
2 2014. (AR 314). On her initial intake, Dr. Shulman performed an
3 initial assessment and assigned a Global Assessment of Functioning
4 ("GAF") score of 48, representing serious symptoms of major
5 depressive disorder.⁴ (AR 308). Throughout their patient-
6 doctor relationship, Dr. Shulman continued to report numerous signs
7 consistent with Plaintiff's major depressive disorder.

8

9 On October 8, 2014, Plaintiff was described as depressed and
10 tearful. (Id.) On November 3, 2014, Plaintiff was described as
11 sad and tearful. (AR 298). On November 18, 2015, in Dr. Shulman's
12 mental assessment for work-related activities, she determined that
13 Plaintiff had poor ability to follow work rules, relate to co-
14 workers, interact with supervisors, deal with work stresses, and
15 maintain attention. (AR 339). The assessment defined "poor" as
16 one's "ability to function in [an] area is seriously limited, but
17 not precluded." (Id.). On June 24, 2015, Plaintiff as described
18 as irritable, anxious and depressed. (AR 331). On August 8, 2015,
19 Plaintiff was described as anxious and depressed. (AR 329). On
20 August 19, 2015, Dr. Karina summarily reported that Plaintiff
21 continues to suffer from "major depressive disorder and receives
22 medication treatment." (AR 314). Dr. Shulman stated that
23 Plaintiff "remains very depressed, has low energy, lack of interest
24 and lack of desire for any social interactions." (Id.).

25 ⁴ A GAF score of 48 is indicative of "serious symptoms (e.g.,
26 suicidal ideation, severe obsessional rituals, frequent
27 shoplifting) OR any serious impairment in social occupational, or
28 school functioning (e.g., no friends, unable to keep a job)." Diagnostic and Statistical Manual of Mental Disorders Text Revision
("DSM"), 34 (4th ed. 2000).

1 In sum, the Administrative Record and the treating doctors' 2 opinions reveal significant mental health symptoms and treatment, 3 including multiple prescriptions for mental health care. This 4 evidence is sufficient to meet the de minimis standard at step-two 5 and should have resulted in a step-two finding of a severe mental 6 impairment.

7

8 **2. The State Agency Consultants' Opinions Are Consistent With**
9 **A Severe Mental Impairment**

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11 The opinions of Maged Botros, M.D., an examining State agency
12 psychiatric consultant, and F.L. Williams, M.D., a non-examining
13 State agency consultant, further support a finding of a severe
14 mental impairment at step-two. On November 3, 2014, Dr. Botros
15 reported that Plaintiff's "affect was dysphoric, tearful,
16 constricted, and congruent with mood" and diagnosed Plaintiff with
17 "Depression, [Not Otherwise Specified]." (AR 295, 297-98). Dr.
18 Botros also noted that Plaintiff's psychosocial stressors regarding
19 her occupation, education, housing, and access to healthcare were
20 "all in moderate degree." (Id.). Furthermore, Dr. Botros gave
21 Plaintiff a GAF score of 51-60. (AR 299). The ALJ stated that
22 Dr. Botros' GAF score was representative of only mild symptoms,
23 however 51-60 GAF score actually indicates moderate symptoms.⁵ This

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25 ⁵ A GAF score of 51-60 is indicative of "moderate symptoms
26 (e.g., flat affect and circumstantial speech, occasional panic
27 attacks) OR moderate difficulty in social, occupational, or school
28 functioning (e.g., few friends, conflicts with peers or co-
workers)." Diagnostic and Statistical Manual of Mental Disorders
Text Revision ("DSM"), 34 (4th ed. 2000).

1 evidence, therefore, offers further support of finding a severe
2 mental impairment at step-two.

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4 **VII.**

5 **CONCLUSION**

6

7 Accordingly, IT IS ORDERED that Judgment be entered REVERSING
8 the decision of the Commissioner and REMANDING this matter for
9 further proceedings consistent with this decision. IT IS FURTHER
10 ORDERED that the Clerk of the Court serve copies of this Order and
11 the Judgment on counsel for both parties.

12

13 DATED: July 10, 2018

14

/S/
SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE

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16 **THIS OPINION IS NOT INTENDED FOR PUBLICATION IN WESTLAW, LEXIS OR
17 ANY OTHER LEGAL DATABASE.**

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